Filed 3/17/09 Marriage of Johnson and Bostwick CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Marriage of JANETTE L. JOHNSON and GARY L. BOSTWICK. JANETTE L. JOHNSON, Plaintiff and Respondent, v. GARY L. BOSTWICK, Defendant and Appellant.	B201435 (Los Angeles County Super. Ct. No. BD397445)

APPEALS from orders of the Superior Court of Los Angeles County, Frederick C. Shaller, Judge. Affirmed.

Bostwick & Jassy, Gary L. Bostwick, Jean-Paul Jassy; and Beatrice H. Nemlaha for Defendant and Appellant.

Law Offices of James R. Eliaser, James R. Eliaser and Marta Serlin Price for Plaintiff and Respondent.

INTRODUCTION

Appellant Gary L. Bostwick (Bostwick) appeals from orders on his order to show cause re modification of spousal support awarded to respondent Janette L. Johnson (Johnson). The first of these orders denied his request for modification. Bostwick contends the trial court abused its discretion by imputing income to him and requiring him to support Johnson's tithing to her church. The second order granted a portion of the requested modification. Bostwick contends the trial court again erred in imputing income to him. We affirm both orders.

FACTUAL AND PROCEDURAL BACKGROUND

Bostwick is an attorney and Johnson is a licensed clinical social worker and marriage and family therapist. The two married on November 22, 1986. They separated on September 2, 2003.

Bostwick and Johnson entered into a Confidential Settlement Agreement (Agreement). The Agreement provided that Bostwick would pay modifiable spousal support to Johnson of $9,000 per month from January 1, 2006 through December 31, 2008. Thereafter, he would pay $7,000 per month until the death of either party, Johnson's remarriage, or further order of the court. The Agreement reflected annual income for Bostwick of $492,000 and a 70-hour workweek.

The trial court entered a judgment of dissolution on December 28, 2005. It retained jurisdiction over the parties in order to enforce the Agreement.

Bostwick turned 65 on April 4, 2006. He had been a partner at Sheppard Mullin Richter & Hampton LLP (SMRH) since 2004. His income in 2006 was approximately $467,000. At the end of 2006, he learned that his income would be reduced by over 25 percent in 2007 and would drop below $350,000.

On January 10, 2007, Bostwick resigned from SMRH and opened his own law firm, the Law Offices of Gary L. Bostwick. On January 16, he filed an order to show cause (OSC) requesting termination or downward modification of spousal support based on a material change of circumstances. As part of the OSC, he agreed to a review of spousal support after six months once his law firm was established and he had a better idea of his income.

On February 2, 2007, Bostwick formed a partnership with Jean-Paul Jassy: Bostwick & Jassy LLP (B & J). By mid-April, Bostwick was able to project gross annual income for B & J to be $250,000 to $300,000, net income for the partnership to be $146,000 to $246,600, and his own net income to be $73,300 to $123,300. At that time, Bostwick estimated that he was working 40 hours per week, including administrative duties, client development and other non-billable activities.

One of Bostwick's goals in starting his own law firm was to reduce his work hours and decrease the amount of stress he was experiencing, in order to improve his health. Since 1997, when Bostwick suffered the first of two mini-strokes, he has been under the care of a cardiologist for heart problems. The medication he takes for one of these problems has led to periodic bouts of gout, ranging from mild to crippling. He has also suffered from cellulitis and acute pancreatitis. The "life of flexible professional choice" afforded him by his own practice allowed him to take better care of his health, reduced his stress and made him happier.

During most of the parties' marriage, Johnson both maintained a private practice and a salaried position with a healthcare provider. During the last year of the marriage, 2003, Johnson worked only at her private practice.

Johnson is a member of, and licensed spiritual practitioner at, Agape International Spiritual Center (Agape). Her clients are primarily referrals from Agape, and she uses a sliding scale for the fees for her services. In order to be a licensed spiritual practitioner at Agape, Johnson must pay a tithe, 10 percent of her income, to Agape.

According to Bostwick's calculations, the amount of Johnson's tithe to Agape has increased substantially since the parties' separation. While her average tithe prior to 2003 was under $300 per year, her average since 2003 has been over $10,000 per year.

The trial court declined to modify spousal support. It explained: "[Bostwick] has shown that the source of his income has changed and that he has now voluntarily resigned from his long-term employment to pursue self-employment. [¶] [Bostwick] is not entitled to use his age of greater than 65 as a means of reducing support under the circumstances of this case where he has voluntarily resigned from a highly stable and lucrative employment and commenced self employment with resulting start-up costs and uncertainties as to amount of future compensation and where the current level of billings from the new firm put in doubt the contention that [Bostwick] will actually suffer any change in income.

"[Bostwick] has failed to prove that his income in his new firm is going to be lower than the income at his old employment. It appears to the court that except for the start-up costs that may take time to recoup, the new firm is billing at a rate nearly commensurate with the compensation at the old firm. Any uncertainties should be resolved in favor of [Johnson]. Further, even if there is a diminution in income actually shown by the record, the court finds it appropriate to impute income to [Bostwick] at the former level under applicable authorities . . . ."

Relying on *In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212 and *In re Marriage of Ilas* (1993) 12 Cal.App.4th 1630, the trial court concluded that Bostwick "should not be entitled to claim a lower rate of income due to his own voluntary choice of self-employment." The trial court therefore imputed to him the difference between his former and his current income.

The court acknowledged that Bostwick's age of 65 was a factor to consider, and that it permitted him to retire if he so chose. However, because Bostwick chose not to retire, his age was not a material factor. The court added that whatever Bostwick's reasons for self-employment were, "it would be unfair to [Johnson] to suffer loss of

support due to [Bostwick's] unilateral action to which she did not agree. . . . [Bostwick] knew when he quit his job that he did so with an order for support he needed to fulfill to his wife. He chose to make the changes in his life he did without court approval and without permission of his former wife to whom he owes support. [Bostwick] should not now be permitted to complain that he must pay support at the prior levels at least until the actual income of the new firm can be determined."

As to Johnson, the trial court found that her "declaration proves by a preponderance of evidence that [Johnson] has used reasonable and good faith efforts to become self-supporting and is earning income commensurate with her level of skill and training. [Johnson] is earning at a level that is consistent with her license as a LCSW. [Johnson] has shown reasonable efforts to increase her income with additional patients, but the 'niche' practice she has had at Agape has prevented much increase in income. The increases in income have been offset by the increased expenses of her practice and the mandatory donations and pro-bono time she needs to pay or expend to maintain her position in the organization. . . ."

The trial court did conclude, however, that "[d]ue to uncertainties as to how [Bostwick's] new firm will perform the court will review the income and relevant factors . . . again in 6 months to determine whether there is a change in circumstances." Bostwick appealed from the order denying modification of spousal support.

While the appeal was pending, the trial court conducted its six-month review of the request for modification of spousal support. After considering the current evidence, the trial court reduced spousal support to $5,000 per month. The court explained that the latest information showed that even if Bostwick had stayed at SMRH, his income might have been reduced. His current income was less than 50 percent of what he had earned at SMRH. "Balanced against the imputation of additional income [Bostwick] would have earned if he had stayed, and considering all facts that reflect on [Bostwick's] ability to pay support, it appears [Bostwick] has suffered a reduced ability to pay support." The court also reiterated that Bostwick was "not entitled to use his age of greater than 65 as

previously stated in prior statement of decision," citing *In re Marriage of Stephenson* (1995) 39 Cal.App.4th 71, 76-78.

The court found that Bostwick failed to prove Johnson's efforts at self-support were inadequate or that her need for support was less. However, it concluded that her "*reasonable* expenses . . . are not more than the combined total of the support awarded and the earned self employment net income. [¶] A balancing of the hardships involved would indicate that [Johnson's] support should be modified downward even if such an adjustment will cut into her ability to meet her usual and customary expenses because [Bostwick] cannot currently sustain his extreme debt load and his own reasonable expenses with the reduced income. In adjusting support, the court is concerned with allocating relatively inadequate combined income to allow both parties to continue to live to a reasonable standard while at the same time considering that [Bostwick] has created a cash flow problem by his own choice." Bostwick appealed from this order.

DISCUSSION

A. *Bostwick's Age and Health as Factors Affecting Spousal Support*

Bostwick's main claims of error, in his challenges to both the original order denying his request for a downward modification of spousal support and the subsequent order granting his request, are that the trial court erroneously failed to consider his age and his health in determining his earning capacity and in imputing to him income that he would have earned had he continued working at SMRH. In Bostwick's view, the fact that he had turned 65, retirement age, and his health problems were material changes in circumstances that the trial court was required to consider and that justified a downward modification of spousal support.

We review an order modifying spousal support for abuse of discretion. (*In re Marriage of Rising* (1999) 76 Cal.App.4th 472, 478.) Discretion is abused when the order exceeds the bounds of reason, when it can fairly be said that no reasonable judge

would have made the same order under the circumstances. (*In re Marriage of Bower* (2002) 96 Cal.App.4th 893, 898-899; *In re Marriage of Reynolds* (1998) 63 Cal.App.4th 1373, 1377.) An abuse of discretion will be found where there is no substantial evidence to support the order. (*Reynolds*, *supra*, at p. 1377; *In re Marriage of McCann* (1996) 41 Cal.App.4th 978, 982-983.)

A party seeking modification of a spousal support order has the burden of showing a material change of circumstances since the previous order. (*In re Marriage of Tydlaska* (2003) 114 Cal.App.4th 572, 575; *In re Marriage of McCann*, *supra*, 41 Cal.App.4th at p. 982.) The factors to be considered in determining whether there has been a material change of circumstances are those set forth in Family Code section 4320. (*In re Marriage of Stephenson*, *supra*, 39 Cal.App.4th at p. 77.) They include the parties' age and health, as well as earning capacity.

In re Marriage of Reynolds, *supra*, held that the court cannot impute income based on ability to earn rather than actual earnings where the supporting spouse chooses to retire at the "'generally accepted retirement age of 65.'" (63 Cal.App.4th at p. 1377.) The court held "that no one may be compelled to work after the usual retirement age of 65 in order to pay the same level of spousal support as when he was employed." (*Id*. at p. 1378.) Bostwick argues that, "[b]y parity of reasoning, income should not be imputed to a supporting spouse who is over the age of 65 (and thus eligible to retire), but who, instead of retiring, slows down his working pace."

While Bostwick's argument makes sense in the abstract, it is not compelling under the facts of the instant case. Bostwick and Johnson voluntarily entered into an Agreement which provided that Bostwick would pay modifiable spousal support to Johnson of $9,000 per month from January 1, 2006 through December 31, 2008. Thereafter, he would pay $7,000 per month until the death of either party, Johnson's remarriage, or further order of the court. Bostwick's 65th birthday would be on April 4, 2006, shortly after spousal support was set to decrease by $2,000 per month. The

Agreement contained no provision for a decrease in spousal support upon Bostwick's retirement.

The reasonable inference is that the parties presumed that Bostwick would not retire but would continue working after turning 65. It also is reasonably inferable that the parties took into account the possibility that Bostwick might slow down his working pace after he turned 65, and that possibility, at least in part, accounted for the decrease in spousal support.

If Bostwick's age and desire to slow down his working pace were considered by the parties in their Agreement, then the trial court rightly declined to consider them material changes in circumstances justifying modification of the agreed-upon spousal support. Rather, the trial court properly found that Bostwick "voluntarily resigned from his long-term employment to pursue self-employment. [¶] [Bostwick] is not entitled to use his age of greater than 65 as a means of reducing support under the circumstances of this case where he has voluntarily resigned from a highly stable and lucrative employment and commenced self employment with resulting start-up costs and uncertainties as to amount of future compensation . . . ."

As the trial court found, a voluntary decision which results in a decrease in income does not entitle the supporting spouse to a reduction in support payments. *In re Marriage of Padilla*, *supra*, 38 Cal.App.4th 1212 and *In re Marriage of Ilas*, *supra*, 12 Cal.App.4th 1630, on which the trial court relied, support the trial court's ruling. In *Padilla*, the court held that the supporting spouse's decision to quit the "well-paying job [he had held] for many years . . . because he wanted the freedom of self-employment and a chance for greater financial rewards" did not entitle him to decrease the amount of child support he was paying. (*Padilla*, *supra*, at pp. 1219-1220.) The court added that if spouses "decide they wish to lead a simpler life, change professions or start a business, they may do so, but only when they satisfy their primary responsibility" of making their support payments. (*Id*. at p. 1220.)

Similarly, in *Ilas*, the court found that the supporting spouse "'did not have the right to divest himself of his earning ability at the expense of [the supported spouse] and his two minor children.'" (*In re Marriage of Ilas, supra*, 12 Cal.App.4th at p. 1639.) Even though the supporting spouse quit his job and returned to school so he could eventually get a better job, he was still obligated to meet his support obligations. (*Ibid.*)

As to Bostwick's health, his own declarations shows that he began suffering health problems in 1997, prior to the parties' separation and the Agreement which set spousal support. Bostwick points to no evidence that his health changed dramatically after the Agreement. He also points to no evidence from a physician that there was a change in his health which necessitated his taking a less stressful job or working fewer hours.

In summary, there is substantial evidence to support the trial court's finding that Bostwick's age and health did not constitute material changes in circumstances justifying a downward modification of spousal support. The trial court therefore did not abuse its discretion in refusing to modify spousal support on those bases. (*In re Marriage of Reynolds*, *supra*, 63 Cal.App.4th at p. 1377; *In re Marriage of McCann*, *supra*, 41 Cal.App.4th at pp. 982-983.)

B. *Imputation of Income Based on Earnings at SMRH*

Bostwick contends the trial court erred in calculating the amount he would have earned had he stayed at SMRH. Specifically, he claims that "[t]he trial court made a fundamental error in finding that Bostwick would have earned $393,270 had he stayed at SMRH for 2007. In fact, uncontradicted evidence demonstrated that Bostwick would have earned 25% less—i.e., less than $350,000—had he stayed at SMRH in 2007."

In imputing income to Bostwick based on his earnings at SMRH, the trial court acknowledged Bostwick's "offer of proof 'that even if [Bostwick] had stayed at his former employment he would have faced a reduction of at least 25% of his income.' [Bostwick's] income at the time he left was $471,378 and the projection of his income if he stayed was $393,270. [Bostwick] also projected that due to diminished billings that

his participation would continue to decrease at the old firm. [Bostwick] voluntarily resigned from his old firm and started a new one wherein he now contends and offers evidence that he is only capable of making an annualized net sum of $170,000. This possibly represents less than one-half of what he could have earned had he stayed at [SMRH], but due to deterioration in [Bostwick's] status at the old firm income could have been lower. [¶] Under the circumstances some imputation of income should be made, but not to the full extent of the income at [SMRH] before departure."

Thereafter, the trial court stated that "[t]he latest information provided to the court provides more data over a longer period of time (01/07 through 09/2007) and indicates that in the calendar year of 2007 [Bostwick] will receive a partnership 'net income' of less than [Bostwick] made at [SMRH] by a factor of greater than 50%. . . . Balanced against the imputation of additional income [Bostwick] would have earned if he had stayed, and considering all facts that reflect on [Bostwick's] ability to pay support, it appears [Bostwick] has suffered a reduced ability to pay support."

It is unclear from the trial court's statement how it calculated the amount of income to be imputed to Bostwick or the amount of spousal support he was able to pay. It is clear, however, that the trial court was aware that Bostwick's actual income was less than half of what he would have made at SMRH and took that fact into account when granting Bostwick a downward modification of spousal support. The trial court's order thus was not based on an unrealistic assessment of what Bostwick would have earned had he stayed at SMRH. (*In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1085-1086; *In re Marriage of Cohn* (1998) 65 Cal.App.4th 923, 931.) The trial court's modification of spousal support therefore did not constitute an abuse of discretion. (*In re Marriage of Reynolds*, *supra*, 63 Cal.App.4th at p. 1377; *In re Marriage of McCann*, *supra*, 41 Cal.App.4th at pp. 982-983.)

C. ***Johnson's Tithing to her Church***

Bostwick asserts that the trial court abused its discretion in considering Johnson's tithing to her church as one of her needs in setting spousal support. He claims he should not be required to support her church, and that requiring him to do so is an unconstitutional violation of the separation of church and state.

In its original denial of Bostwick's request to modify spousal support, the trial court found that Johnson had "used reasonable and good faith efforts to become self-supporting and is earning income commensurate with her level of skill and training. [Johnson] is earning at a level that is consistent with her license as a LCSW. [Johnson] has shown reasonable efforts to increase her income with additional patients, but the 'niche' practice she has had at Agape has prevented much increase in income. The increases in income have been offset by the increased expenses of her practice and the mandatory donations and pro-bono time she needs to pay or expend to maintain her position in the organization. . . ."

In its subsequent order modifying spousal support downward, the trial court did not discuss Johnson's tithing to her church. Rather, it found that Bostwick failed to prove that Johnson's efforts to support herself were inadequate or self-defeating, or that her need for support was any less. It also found that Johnson's reasonable expenses were not more than her earned income and awarded spousal support. The court concluded that "[a] balancing of the hardships involved would indicate that [Johnson's] support should be modified downward even if such an adjustment will cut into her ability to meet her usual and customary expenses because [Bostwick] cannot currently sustain his extreme debt load and his own reasonable expenses with the reduced income. In adjusting support, the court is concerned with allocating relatively inadequate combined income to allow both parties to continue to live to a reasonable standard while at the same time considering that [Bostwick] has created a cash flow problem by his own choice."

Bostwick's claim of error rests on the faulty assertion that "[i]t was an abuse of discretion and an error as a matter of law for the court below to enter an order, post-

separation, requiring Bostwick to support Johnson's tithing." The trial court entered no such order. Any support for Johnson's tithing that Bostwick provided was the result of the Agreement *he* made with Johnson.

In the order denying a modification of spousal support, the trial court did not state that Bostwick was required to support Johnson's tithing. Rather, it noted that the increases in Johnson's income were offset by increased business expenses. Its denial of the request for modification was not based on Johnson's need to tithe to her church but rather on Bostwick's voluntary self-employment and uncertain income. When the trial court ultimately decided on a downward modification of spousal support, Johnson's tithing was not a factor. Based on all the appropriate factors, the trial court decreased spousal support and left the decision to Johnson as to how she should handle the decrease. This was proper; the court has authority to set support but no authority to order that it be spent (or not spent) in a particular manner. (Cf. *In re Marriage of Chandler* (1997) 60 Cal.App.4th 124, 130.)

In sum, the trial court did not abuse its discretion by considering Johnson's tithing to her church as one of her needs in setting spousal support, it did not require Bostwick to support her church, and there was no violation of the establishment clause.

DISPOSITION

The orders are affirmed. Johnson is to recover costs on appeal.

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JACKSON, J.

I concur:

WOODS, J.

Perluss, P. J., Concurring.

I believe the trial court erred in disregarding Gary L. Bostwick's age and health as factors affecting his ability to support his former wife, Janette L. Johnson, and imputing income to Bostwick based on his hypothetical earnings if he had remained a partner at Sheppard Mullin Richter & Hampton LLP (SMRH). However, because the trial court reduced Bostwick's support obligation from $9,000 per month to $5,000 per month once it had sufficient information concerning Bostwick's current earnings at his new law firm—a figure that appears appropriate in light of the financial information presented—I conclude any such error was harmless. (See Cal. Const., art. VI, § 13 [only error causing miscarriage of justice is proper ground for setting aside judgment]; *In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1329 [award of temporary spousal support properly set aside only upon showing of prejudicial error].) Accordingly, I concur in the judgment.

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PERLUSS, P. J.